Further, appellant in his application has stated that he is not the guardian of respondent's wife and not liable for the return of the "lobola"—he has therefore made out a *prima facie* defence on the main issue.

Appeal allowed with costs and the Native Commissioner's judgment is altered to read—

"Default judgment rescinded. Costs to be costs in the cause."

For Appellant: Mr. Oeschger of Pretoria i/b Rooth and Coxwell of Louis Trichardt.

For Respondent: In person.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(North-Eastern Division)

Qaurter ending 31st. December, 1948

Volume I

(Part II)

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1949

G.P.-S.11259—1948-9—500.

ERRATA.

1947. Page 98: Delete heading and substitute:—

"Held (1) Estates in Natal fall to be dealt with under the provisions of Section 22, Act No. 38 of 1927;

(2) Section 11, Law No. 46 of 1887 (Natal) has been tacitly repealed by Act No. 38 of 1927."

1948. Page 4, Pika Ngcobo *v.* Hlungwana, 1931 N.A.C. (N. & T.): Delete "N. & T." and substitute "(T. & N.) (not reported)."

1948. Page 6, lines 23-24: Delete "decided on 3rd October, 1947 (not yet reported)" and substitute "page 99".

1948. Page 15, line 9 from the bottom: Delete "116" and substitute "110".

1948. Page 18, line 26: Delete "33" and substitute "53".

1948. Page 30, line 18 from bottom: Delete "Case No. 42/1/47 (not yet reported)" and substitute "page 95".

1947. Page 23, line 12 from bottom: Substitute "1940" for "1939".

1947. Page 38, line 11 from bottom: For "1943" substitute "1942".

1947. Page 49, line 19: Delete "Case No. 13 of 1947" and substitute "page 19".

1947. Page 51, line 14 from bottom: Delete "(not yet reported)" and substitute "Page 19".

1947. Page 66, line 3: Delete third line and substitute "page 75".

1947. Page 99, line 4: Delete "1889" and substitute "1887".

1947. Page 103, line 2: For "805" substitute "105".

1947. Page 117, line 12 from bottom: Delete "(not yet reported)" and substitute "25".

1947. Page 117, line 18 from bottom: After "cases" add "in addition to the present case".

Page 117, lines 10 and 11 from bottom: Delete all the words from "Reseline" to "reported".

1947. Page 117, line 12: Delete "(not yet reported)" and substitute "25".

1947. Page 119, line 9: Delete "(not yet reported)" and substitute "53".

1947. Page 130, line 41: Delete "631" and substitute "63".

1947. Page 130, line 45: Delete "1940" and substitute "1942".

CASE No. 20 OF 1948.

SIFO DHLAMINI (Appellant) *v.* SAMSON MDHLULI (Respondent).

(N.A.C. Case No. 41/4/48.)

VRYHEID: Tuesday, 5th October, 1948. Before Steenkamp, President; Oftebro and Leibnitz, Members of the Court (North-Eastern Division).

Practice and Procedure—Plea—Rule 26 (*a*), *Government Notice No.* 2253 *of* 1928 (*Native Commissioner's Court Rules*) *requires a plea to be taken on counter-claim.*

Held:

(1) That after a counter-claim has been preferred, the plaintiff shall be called upon to admit or deny such counter-claim.

(2) Facts found to be proved should be stated in a clear manner and should not be argumentative.

Appeal from the Court of the Native Commissioner, Vryheid.

Steenkamp, President (delivering the judgment of the Court):—

The plaintiff sued the defendant in the Native Commissioner's Court for the payment and delivery of five head of cattle or payment of their value of £25, being the balance of lobolo due to plaintiff by the defendant, which the latter agreed to pay in respect of his marriage to plaintiff's late daughter, Martha.

On the date of appearance, defendant consented to judgment for three head of cattle and costs, but denied liability for the other two head of cattle claimed. Defendant also counter-claimed against the plaintiff for delivery of certain articles which belonged to his late wife, Martha, and which were of a personal nature. He also claimed their alternative value of £25.

No plea was tendered in respect of the counter-claim. Rule 26 (*a*) of the Native Commissioner's Court Rules makes it clear that after a counter-claim has been preferred, the plaintiff shall be called upon to admit or deny such counter-claim. It is therefore not understood why no plea to the counter-claim was called for.

The Native Commissioner, on the claim in convention, gave judgment in favour of the plaintiff for five head of cattle and costs. On the claim in reconvention, judgment was entered for defendant (in reconvention) with costs.

An appeal has been noted to this Court by the defendant on the claim in convention in so far as it exceeds the amount tendered by the appellant in his plea, and against the whole of the judgment on the claim in reconvention. The grounds of appeal are that the judgments are against the evidence and the weight of evidence.

This Court is constrained to remark that the Native Commissioner's reasons do not comply with Rule 12 (1) of the Native Appeal Court Rules. He has not set out the facts he found to be proved. His reasons are more of an argumentative nature and his attention is drawn to the case of Nkosi *v.* Dhlamini and Another, 1936 N.A.C. (T. & N.) 87, where this Court remarked that argumentative reasons for judgment are to be deplored. Again, in the case of Hlongwane *v.* Hlongwane, 1947 N.A.C. (T. & N.) 111, in which it was stated that a judicial officer must state in a clear manner what facts he found to be proved.

It is not disputed that when the marriage was arranged between defendant and Martha, she already had two children by other men. It is also not disputed that the lobolo agreed upon between the plaintiff and defendant was ten head of cattle plus the nqutu beast. The customary union was duly registered at Paulpietersburg on the 10th day of February, 1943, and on the certificate produced at the trial in this case, it is mentioned that five head of cattle and an nqutu beast had been paid on account, and that the balance of five head of cattle should be paid within twelve months' time.

Defendant states that since the celebration of the marriage he paid a further two head of cattle to the plaintiff and the crux of the case in convention is whether or not these two head of cattle were paid as alleged by the defendant. The onus is on the defendant to prove that he paid these two head of cattle. There is also contradictory evidence between the defendant and his father as to the manner and the equivalent of cattle paid before the marriage took place. These discrepancies are immaterial except when it comes to the question of credibility of evidence. Defendant's father is not in a position to state that he actually witnessed the

payment of the two head of cattle. He tells the Court that he saw the one beast afterwards in the possession of the plaintiff. He talks of a beast, whereas his son, the defendant, eventually mentions a horse. The Native Commissioner seems to have attached considerable importance as to whether the one head of cattle was actually a beast or a horse, but this Court does not overlook the fact that Natives, when it comes to the question of lobolo, will always talk of cattle, and they are not so much concerned with the fact whether it was actually a beast or the equivalent of a beast. Let this be as it may, the Native Commissioner has believed the plaintiff in preference to the defendant, on whom the onus was, as mentioned before, and no good argument has been advanced for this Court to be in a position to state that he has erred in his conclusions.

There is, however, another aspect in the whole case, and that is, that according to Section 87 of the Code, the plaintiff could only have claimed ten head of cattle or their equivalent, as lobolo. It is true Section 96 (1) provides for the additional payment of one beast, as the nqutu beast, but this section makes it clear that the nqutu beast is only payable if the woman had not previously been seduced by some person other than the husband. It being admitted that Martha had previously been seduced, the father could not claim more than ten head of cattle as lobolo. In fact, he has actually claimed eleven head, and therefore, according to Section 88 of the Code, any person receiving lobolo in excess of the scale prescribed in Section 87, shall be guilty of an offence, and it follows that where he has demanded and received cattle in excess of the prescribed scale, the payer is entitled to be refunded the excess.

This reduces the appellant's claim to four head of cattle, but if he wishes to obtain the full lobolo, he is bound under the Native Law and Custom to pay what is known as the "mvimba" cattle which, in this case, would be two head of cattle, as the woman had born two illlegitimate children from men other than her husband.

The case of Msonti Ndhlovu *v.* Tshezi, 1927 N.H.C. 1, is authority that the husband is justified in setting off against the lobolo he owes, one beast called "mvimba", for every child his wife had previously born by other men.

The claim now boils down to two head of cattle, after the two "mvimba" beasts have been set off, but as the defendant had tendered three head of cattle, and he is only appealing against that part of the judgment in excess of his consent, the plaintiff is entitled to judgment for three head of cattle.

The appeal on the claim in convention is allowed with costs, and the Native Commissioner's judgment is altered to read: "For plaintiff for three head of cattle, or their value, £15, with costs to date of consent to judgment. Costs after this to be borne by plaintiff."

Coming now to the claim in reconvention, it is clear, beyond doubt, that the plaintiff in reconvention gave the articles which were of a personal nature, belonging to his late wife, to his people-in-law. It can quite easily be understood that clothing and other personal belongings would be given to the relatives of the deceased woman.

Plaintiff admits he gave them to his late wife's people, but he wishes this Court to believe that he only did so because his father-in-law had promised that he would refund some of the cattle. His father, who was called as a witness, denies that anything was said at the interview about the return of the lobola cattle. and therefore the plaintiff in reconvention cannot succeed.

The appeal against the judgment in reconvention is dismissed with costs.

For Appellant: Mr. W. E. White, of Messrs. Conradie & White, Vryheid.

For Respondent: Mr. J. F. du Toit, of Messrs. Henwood & Co., Vryheid.

Cases referred to:

Nkosi *v.* Dhlamini & Another, 1936 N.A.C. (T. & N.) 87.

Hlongwane *v.* Hlongwane, 1947 N.A.C. (T. & N.) 111.

Statutes, Ordinances, etc:

Government Notice No. 2253/1928, Section 26 (*a*).

Government Notice No. 2254/1928, Section 12 (1).

Natal Code of Native Laws, 1932: Sections 87 and 96 (1).

CASE No. 21 OF 1948.

MDEKU MADIDE (Appellant) *v.* SIMON ZWANE (Respondent).

(N.A.C. Case No. 41/5/48.)

VRYHEID: Tuesday, 5th October, 1948. Before Steenkamp, President; Oftebro and Leibnitz, Members of the Court (North-Eastern Division).

Practice and Procedure—Native Custom—Lobolo—A person cannot take the law into his own hands, and repossess lobolo already delivered, even though the customary union was prohibited by the law, e.g. by Section 15 of Law No. 46 of 1887.

Held: That notwithstanding prohibition of a subsequent customary union where parties were previously married by Christian rites, it is not competent for the Defendant to take the law into his own hands and remove lobola cattle from the person to whom delivered. He must bring an action before a Court of Law to have customary union declared a nullity and only if he is successful may he take steps in a Court of Law for the return of the lobolo paid by him.

Appeal from the Court of the Native Commissioner, Vryheid.

Steenkamp, President (delivering the judgment of the Court):—

Plaintiff claims from defendant three head of cattle, viz., a black cow with white spots, an Inco tollie and a black heifer, which he avers are his property and were wrongfully and unlawfully removed from the possession of Mtwazi Zwane.

In his plea, defendant admits that he has in his possession the black heifer calf referred to in the summons, but denies being in possession of any other beast from Mtwazi Zwane. He further denies that he took these cattle wrongfully and unlawfully and that plaintiff is the owner of these cattle.

From the evidence adduced by the plaintiff it appears that he acquired the cow from Sicoco Zwane by way of exchange for an ox. This cow was paid to Sicoco by the defendant as lobolo for defendant's wife, Solomina, whom he married by Native Law and Custom about six years ago. The parents of Solomina were married by civil rites and as Sicoco is her eldest brother, he was entitled to her lobolo.

Defendant closed his case without calling any evidence, but from the trend of the cross-examination of plaintiff and his witnesses, it would appear that defendant takes up the attitude that as Solomina's parents were married by civil rites, her marriage to him was null and void, and he was entitled to repossess himself of the lobolo he paid for her, without any Order of Court.

The Native Commissioner gave judgment in favour of plaintiff for the three head of cattle claimed, and against this judgment defendant has noted an appeal to this Court on the following grounds:—

(1) The Court erred in holding that defendant lost his ownership in the cattle claimed.

(2) Plaintiff failed to establish his case, in that the evidence proved that ownership in the cattle did not vest in the seller (Sicoco) by reason of an invalid transaction between defendant and the said Sicoco.

(3) Sicoco was not the owner of the cattle and could transfer no better title in the ownership of the cattle to the plaintiff.

(4) The Court erred generally in its application of the law, and its findings are against the weight of the evidence.

Even if we accept that the cattle paid by the defendant to Solomina's guardian, Sicoco, were looked upon as "Sisa" cattle until the marriage is celebrated, it does not entitle the defendant to take the law into his own hands and take possession of the cattle without an Order of Court. In the case of Lumkwana *v.* Lumkwana, 1933 N.A.C. (C. & O.) 6, on page 8, the Court ruled Ngoma custom (which is the same as the "Sisa" custom) that the stock is lent only during the pleasure of the lender and can be re-demanded at any time, but it is not competent for the owner to remove the cattle out of the possession of the person they were ngomaed to without the knowledge and concurrence of the latter.

From the record there can be no doubt that defendant did enter into a customary union with Solomina, but whether they were competent to do so, in view of the fact that her parents were married by civil rites, is beside the point, and if defendant wishes to rely on the provisions of Section 15 of Natal Law, No. 46 of 1887, he must bring an action before a Court of Law to have the customary union declared a nullity. Only if he is successful, may he take steps in a Court of Law for the return of the lobolo paid by him.

The appeal is dismissed with costs.

For Appellant: Mr. J. F. du Toit, of Messrs. Henwood & Co., Vryheid.

For Respondent: Mr. W. E. White, of Messrs. Conradie & White, Vryheid.

Cases referred to:

Lumkwana *v.* Lumkwana, 1933 N.A.C. (C. & O.) 6.

Statutes, Ordinances, etc., referred to:

Natal Law, No. 46 of 1887, Section 15.

CASE No. 22 OF 1948.

MKATINI RADEBE (Appellant) *v.* MBANDHLWA TSHAPA (Respondent).

(N.A.C. Case No. 36/1/48.)

PIETERMARITZBURG: Monday, 11th October, 1948. Before Steenkamp, President; Hobson and Cowan, Members of the Court (North-Eastern Division).

Practice and Procedure—Native Chief's Courts—No provision for Interpleader action—Native Custom—Allotment of girls for lobolo of a brother—Lobolo—Ownership rests in the Kraal Head.

Held:

(1) No provision exists in Chief's Courts Rules for an Interpleader action and the only recourse open to the claimant is an ordinary action in the Native Commissioner's or the Chief's Court.

(2) An allottee of a girl can only claim the balance of her lobolo remaining at the time he gets married.

(3) The ownership of cattle paid for a girl rests in the kraal head and not in the allottee of the girl.

Appeal from the Court of the Native Commissioner, Richmond.

Steenkamp, President (delivering the judgment of the Court):—

Magxolo Tshapa, the judgment debtor, was sued by Mkatini Radebe, before the Chief about 23 years ago for a debt of £15. Judgment was granted against the judgment debtor, and he made certain payments in reduction of the judgment.

The judgment debtor had a daughter by the name of Elina and when she got married and lobolo was paid, the judgment creditor duly caused four head of cattle to be attached, apparently in satisfaction of the balance of the judgment debt.

Mbandhlwa Tshapa, a son of the judgment debtor then interpleaded as the claimant and in his claim he avers that the girl Elina was allocated to him and therefore the lobolo paid for her belongs to him. The Interpleader action was tried by the Chief who gave judgment in favour of defendant, i.e., the judgment creditor. An appeal was noted to the Native Commissioner, who declared the cattle not executable and ordered the judgment creditor to pay costs. An appeal has now been noted to this Court. It should be noted that the appellant was not represented in the Court below, and therefore, grounds of appeal are not necessary.

In the case of Majola *v.* Dhlamo, 1937 N.A.C. (T. & N.) 13, it was remarked that no provision exists in the Rules for Chiefs' Courts for an Interpleader action, and that the only recourse open to the plaintiff is in the Native Commissioner's Court, where the aggrieved party may sue by way of action without interpleading, or may also sue in the Chief's Court in the same manner.

Mkize *v.* Ntule, 1932 N.A.C. (T. & N.) 44, is an authority that no provision is made in the Rules of the Chiefs' Courts for Interpleader actions. That case went further and laid it down that the correct procedure was for the aggrieved party to have applied to the Chief for relief in accordance with Native Law, as indicated in Rule 1, and not to have invoked the assistance of the Native Commissioner's Court. If he failed to get redress from the Chief, it would then have been competent for him to have appealed to the Native Commissioner.

In the case of Majozi *v.* Shezi, 1937 N.A.C. (T. & N.) 140, action was commenced in the Chief's Court by way of an Interpleader summons, but as the irregularity had not prejudiced the appellant, the Court refused to disturb the judgment on this ground.

The same reasoning applies in the present case, but this Court wishes to make it clear that Lower Courts would be well advised to see that action in the correct form is brought before their Courts and any irregularity that might exist should be rectified before trial takes place.

This Court will, therefore, treat this case, not as an Interpleader action, but as an ordinary action based on a summons of the first instance.

The plaintiff (i.e. respondent) in his evidence claims that about three years ago his father allocated Elina to him as the source of his lobolo. The appellant on the other hand states the cattle were attached in 1946, and it was only during the following year that the girl was allocated to the respondent and after she got married.

It is not necessary for this Court to decide the doubtful legality of the allocation, as on respondent's own evidence, and that of his witnesses, it is clear that when the lobolo for Elina was delivered, ownership passed to the respondent's father, who was the judgment debtor in the case between himself and the present appellant.

According to Section 36 of the Code, a kraal head is the owner of all kraal property in his kraal, as remarked by Weber (Member) in the case of Xulu *v.* Langa, 1940 N.A.C. (T. & N.) 117, a kraal head cannot be heard to say, when he is met by a claim: "I have allocated all my property to my sons who are still at my kraal and I have therefore nothing with which to satisfy your claim."

The allotment of a girl by a father to one of her brothers means that the allottee is entitled to expect that the lobolo which he requires when he marries shall be provided from the cattle paid for the girl in question on her marriage.

The respondent is not yet married and he may never get married, but if he does, he is only entitled then to claim that the lobola cattle still remaining from his sister's lobolo, should be made available for his own lobolo.

It does not follow that he acquires ownership rights in the cattle on the day his sister married. [See Nkosi *v.* Tenjekwayo, 1938 N.A.C. (T. & N.) 91.] The ownership rests in the kraal head and not in the allottee of the girl.

Counsel for appellant has not been able to advance any argument in favour of the appeal, but notwithstanding this, the appeal is before the Court, and it is the duty of this Court to see that justice is done.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

"Appeal from the Chief's Court is dismissed with costs."

For Appellant: Mr. A. W. Britz, of Messrs. Raulstone & Co., Pietermaritzburg.
Respondent: In default.

Cases applied:

Mkize *v.* Ntuli, 1932 N.A.C. (T. & N.) 44.

Majola *v.* Dhlamo, 1937 N.A.C. (T. & N.) 13.

Majozi *v.* Shezi, 1937 N.A.C. (T. & N.) 140.

Nkosi *v.* Zengekwayo, 1938 N.A.C. (T. & N.) 91.

Xulu v. Langa, 1940 N.A.C. (T. & N.) 117.

Statutes, Ordinances, etc., referred to:

Natal Native Code, 1932, Section 36.

CASE No. 23 OF 1948.

BEKENI DHLAMINI (Appellant) *v.* (1) NHLANGOTI MKIZE and (2) NGONONDWANE MKIZE (Respondents).

(N.A.C. Case No. 43/1/48.)

PIETERMARITZBURG: Monday, 11th October, 1948. Before Steenkamp, President; Hobson and Cowan, Members of the Court (North-Eastern Division).

Practice and Procedure—Damages—Unlawful killing—Proof of cause of death.

Held: That before a defendant can obtain damages for the killing of the deceased, it must be proved that the deceased died as a result of the wound inflicted by the aggressor.

Appeal from the Court of the Native Commissioner, Weenen.

Cowan, Member of Court (delivering the judgment of the Court):—

The plaintiff (appellant), assisted by her guardian, sued defendant No. 1 (respondent) for £100 damages for wrongfully and unlawfully assaulting her husband, to whom she was married by Native Custom, and thus causing his death. Defendant No. 2 was joined as being the father and kraal head of defendant No. 1.

On the day of the trial, defendant No. 2, who was in hospital, was in default. Plaintiff's attorney intimated that he wished to proceed against defendant No. 1 and that he might ask for a postponement in regard to defendant No. 2.

Defendant No. 1 then pleaded to the claim denying that he had assaulted plaintiff's husband as alleged and further denied that she had suffered the damages alleged.

From the evidence given by Zwelake on behalf of plaintiff, it appeared that the plaintiff's husband, Mzizi, and a number of other men, including defendant No. 1, were drinking beer at the kraal of one Hlonono. On getting up, defendant No. 1 jumped on to elderly people and Mzizi remonstrated with him for doing so. Defendant retorted that he was not going to listen to Mzizi and dubbed him a coward. Both then got up, Mzizi with his own sticks, and the defendant picking up one which belonged to the witness. The witness states that he got between them and got hold of Mzizi who told him to let go. He did so and Mzizi then went to fight with the defendant No. 1.

In the fight which ensued, Mzizi was struck on the head by the defendant. Mzizi then walked to a hut at a neighbouring kraal about 150 yards away, where he sat the whole night. He died the next morning.

After the plaintiff had given evidence regarding the amount of support afforded her by her late husband, her case against defendant No. 1 was closed.

Defendant No. 1's attorney then applied for an absolution judgment and after hearing argument on both sides, a judgment of absolution from the instance with costs was entered by the Native Commissioner. He based this judgment on his findings that although in the fight Mzizi received a blow on the head from which he died, Mzizi was in fact the aggressor, and that although there was some measure of provocation on the part of defendant No. 1, he had not used force in excess of what he was entitled to use to repel the attack made on him by Mzizi.

Against this judgment an appeal has been lodged on the following grounds:—

1. That the Native Commissioner erred in holding that the plaintiff as widow of the deceased could not succeed in a claim for damages against the man who killed her husband.
2. That the Native Commissioner erred in holding that there was insufficient evidence, at the close of plaintiff's case for a reasonable man to base a judgment on in favour of plaintiff.
3. That the Native Commissioner erred in giving judgment while part of the case was still pending.
4. That the judgment is wrong in law against the evidence recorded and not in accord with real or substantial justice.

Ground 4 is a repetition of the other grounds and need not be referred to again.

In order to succeed in her claim it was necessary for the plaintiff to establish that Mzizi died as a result of the blow delivered by defendant No. 1.

The Native Commissioner found, as a proved fact, that Mzizi died from this blow. In this Court's view the evidence by no means justifies this finding. The only evidence on record is that Mzizi was struck on the head and that he died the next morning. Presumably, although this is not stated, the blow caused a wound, but no attempt was made to describe the wound or to prove that it was a serious one, nor was medical evidence called to prove that it resulted in Mzizi's death. It is true that Zwelake says that he gave evidence at the trial of the defendant and that after the trial he went to gaol, but the Court is left in the dark as to the nature of the charge against the defendant.

Her failure to establish that the deceased met his death as a result of the blow received by him is in itself sufficient to debar the plaintiff from succeeding in her claim.

In the absence of conclusive evidence that the deceased died as a result of the blow inflicted by the defendant, there is no need to consider Counsel for appellant's contention that the onus is on the defendant to show that he was legally justified in delivering the blow.

Unless she was successful in her claim against No. 1 defendant, plaintiff could not possibly succeed against defendant No. 2, who was joined in the action merely because he was the father and the kraal head of defendant No. 1. The third ground for her appeal, which was not pressed in this Court, fails as well, therefore.

The appeal is dismissed with costs.

For Appellant: Mr. Seymour, instructed by Messrs. Hellett & De Waal, Estcourt.

For Respondents: Mr. Nathan, instructed by Mr. E. Franklin, Weenen.

CASE No. 24 OF 1948.

MAKLEINTJIES MKIZE (Appellant) *v.* MAZUMA MKIZE (Respondent), duly assisted by Buzumuthi Mkize.

(N.A.C. Case No. 34/4/48.)

PIETERMARITZBURG: Tuesday, 12th October, 1948. Before Steenkamp, President; Hobson and Cowan, Members of the Court (North-Eastern Division).

Practice and Procedure—Native Chief's Court—Jurisdiction—Action for defamation. Defamation—Natal Code, Section 132*—No allegation of evil conduct.*

Held:

(1) A statement which does not allege evil conduct on the part of the plaintiff is not defamatory in terms of Section 132 of the Natal Code.

(2) A Chief's Court has no jurisdiction to try a defamation case unless the statements alleged are defamatory in terms of Section 132 of the Code.

Appeal from the Court of the Native Commissioner, Bulwer.

Cowan, Member of Court (delivering the judgment of the Court):—

In this case the plaintiff, duly assisted by her husband, sued the defendant in the Chief's Court for £10 damages for defamation of character. She complained that in the presence of her mother and another man, the defendant had used the following words of and concerning her: "u cita abafazi yintwana engazali", meaning: "she chases away women, a barren little thing".

The Chief found that the words had been used and gave judgment in her favour for £5 and costs, and this judgment was sustained by the Native Commissioner on appeal.

The matter was brought to this Court on appeal, the main grounds relied on being—

(*a*) that the words complained of are not defamatory *per se* and that there is no evidence of malice; and

(*b*) that the evidence of publication is unsatisfactory and insufficient.

The Code (Section 132) summarises the Native law of defamation in Natal and Zululand. In terms of this section, to constitute defamation, a statement must be malicious and must allege evil conduct on the part of a person. Unless both these requirements are met, a statement cannot be said to be defamatory in Native Law.

Now the terms in which the defendant is alleged to have referred to the plaintiff are undoubtedly disparaging, and would tend to belittle her in the eyes of her fellow Natives, but the words cannot be said to impute evil conduct to her. Whatever may be the position in Common Law, they are not actionable in Native Law.

As the jurisdiction conferred on Chiefs by Section 12 of Act No. 38 of 1927 to hear and determine civil claims is restricted to those arising out of Native Law and Custom, the Chief could only apply Native Law in this case. He should, therefore, have dismissed the claim.

The appeal is upheld with costs, and the judgment of the Native Commissioner is altered to read:—

"Appeal upheld with costs and judgment of the Chief altered to read: 'Claim dismissed with costs.'"

For Appellant: Mr. McGillewie, Pietermaritzburg.

Respondent: Present in person.

Statutes, Ordinances, etc., referred to:

Native Administration Act, 1927 (No. 38 of 1927), Section 12.

Natal Code of Native Law, 1932, Section 132.

CASE No. 25 OF 1948.

CITJA BUTELEZI (Appellant) *v.* **HAMBAKE MAJOZI (Respondent).**

(N.A.C. Case No. 22/4/48.)

PIETERMARITZBURG: Tuesday, 12th October, 1948. Before Steenkamp, President; Hobson and Cowan, Members of the Court (North-Eastern Division).

Practice and Procedure—Condonation of late appeal—Granted—Because of general importance and conflicting judgments on the matter.

Interpleader—Onus of proof.

Held: That—

(1) unless the cattle are attached in possession of the claimant, the onus is on the claimant to prove ownership;

(2) where cattle are attached in possession of neither the claimant nor the judgment debtor, the onus is nevertheless on the claimant.

Appeal from the Court of the Native Commissioner, Msinga.

Steenkamp, President (delivering the judgment of the Court):—

This is an application for condonation of late noting of appeal.

Applicant has filed an affidavit to the effect that there was tribal unrest in the

Msinga district, and he could therefore not consult an attorney at Weenen at an earlier date—there being no attorneys practising at Msinga. His statement that some official at the Court-house, Msinga, informed him that if he desired to appeal, he should consult an attorney, cannot be accepted on its face value without some corroborative affidavit.

The reasons for the late noting of the appeal are not such that this Court would, in normal circumstances, have considered granting condonation, but the issue in the case is of general importance and involves a legal point on which several conflicting judgments have been given by this Court, and for this reason alone, condonation is warranted.

The application is granted, and Counsel for appellant is called upon to argue the appeal.

From the record it appears that the execution creditor, after he had been divorced from his wife, Mita, claimed and was awarded refund of certain lobolo paid to her guardian, Amos Dhlamlenze, the judgment debtor who, however, had no cattle. Subsequently Mita remarried and certain cattle were paid to Amos as lobolo by Radebe. The execution creditor ascertained that these cattle were at the kraal of Gufa Butelezi and he caused an attachment to be made. The claimant then instituted Interpleader proceedings against the execution creditor. He was not able to prove to the satisfaction of the Native Commissioner that he was the owner of the cattle which were declared executable. An appeal has now been noted to this Court on the following grounds:—

1. That it is against the evidence and the weight of evidence.
2. That as the cattle attached were not in possession of the judgment debtor, the Court erred in placing the onus upon the claimant.
3. That the respondent had failed to discharge the onus or to prove that the cattle attached were the property of the judgment debtor.
4. That the evidence given by the respondent was not direct, but hearsay and was inadmissible.
5. That by reason of the delay by the respondent in making the attachment eight or nine years after the judgment in his favour and only after the death of Gufa has been to the prejudice of the claimant.

Grounds 1 and 2 can conveniently be dealt with together and if it is found that the onus was correctly placed on the claimant, then ground 3 falls away. The endorsement by the Messenger of the Court does not state in whose possession the cattle were attached and the Native Commissioner, before fixing the onus, obtained the following statement from the execution creditor:—

> "I attached the cattle in question in the possession of Gufa Butelezi, who received these cattle as lobolo for my divorced wife. Amos Dhlamlenze (judgment debtor) placed the cattle with Gufa to escape the judgment debt."

The claimant's reply reads as follows:—

> "These cattle I placed there: I bought these cattle from different people."

From these two statements it is therefore clear that the cattle were neither in possession of the judgment debtor nor in possession of the claimant. They were, in fact, in the possession of a third person.

It was decided in the case of Chokoe v. Moneri, 1934 N.A.C. (T. & N.) 81, that the fact that property forming the subject of an Interpleader claim was in the possession of neither the judgment debtor nor the claimant, but of a third party at the time of attachment, does not have the effect of shifting the onus of proof from the claimant to the judgment creditor.

In that case, various authorities were quoted by Rogers (Acting President) and the conclusions arrived at would appear to be sound reasoning, and this Court has not been able to find any subsequent Supreme Court decision, nor has any been quoted, to enable this Court to hold a different view, but the same issue was again raised at a later date in Tabeta and Tabeta *v.* Mabuza, 1937 N.A.C. (T. & N.) 87. McLoughlin (P.) is reported to have stated in effect that as the stock were attached at the kraal of a man Hotnot and not at Bunti's kraal (judgment debtor), the onus of proof rested on the execution creditor to show that the stock was executable. The earlier case of Chokoe *v.* Moneri already referred to was not distinguished from, nor was it apparently consulted. The position at this stage was therefore that two conflicting judgments on the same legal issue concerning the onus in Interpleader actions were on record.

The same issue was raised and decided in Mhlonthlo *v.* Xakaxaku, 1940 N.A.C. (C.O.) 52, in which the same President (McLoughlin) presided. In that case various authorities are referred to and those placing the onus on the claimant were commented on, but not accepted. In Zandberg *v.* Van Zyl, 1910 A.D. at p. 308, it is stated that possession of a moveable raises a presumption of ownership and he who seeks to disturb that presumption must do so by clear and satisfactory evidence. It should not, however, be overlooked that in the present case and in Mhlonthlo's case, the property was not found in possession of the claimant, but in possession of a third party, and the judgment given in that case cannot be reconciled with the dictum by McLoughlin (P.) where he states on page 52 that the onus of proof is thus upon the person out of possession at the time of the attachment, whether he be the claimant or the execution creditor. It was not a case in which both the execution creditor and the claimant claimed the property from the possessor, but one in which the claimant asserted ownership, notwithstanding that the property was attached in possession of a third person.

We cannot agree with Hartley (M.) in Mhlonthlo's case where he states on page 57 that it is the execution creditor who brings the matter into Court and makes the definite assertion that the property belongs to the judgment debtor. The way I understand Interpleader actions is that the execution creditor asserts, when he causes the attachment to be made, that in so far as the judgment debtor and the possessor of the property are concerned, the former is the owner. This is as far as he can go, and if the possessor claims ownership in the property which he is legally presumed to own, then the onus is on the execution creditor to prove that the person from whose possession the attachment was made is not in fact the owner.

We know of no presumption of law in favour of a claimant not in possession. This brings us to the legal maxim that "he who asserts must prove". This onus of proof can be shifted to the other side by a legal presumption but in the absence of such a presumption, the claimant must prove his ownership. We therefore hold the view that the decisions in Tabeta and Mhlonthlo cases were not correct.

The only occasion in which the onus rests on the judgment creditor is when stock attached are in possession of the claimant at the time of attachment. The Native Commissioner has correctly decided the question of onus, and therefore ground 3 must fall away.

Even if respondent had not adduced any evidence, the Court must still decide whether the claimant has proved that he is the owner of the stock attached. It is true the respondent relied on information he was able to collect before the attachment was made, but as there was no onus on him to prove anything, he had to rely—to a large extent—on the question as to whether the claimant was able to prove ownership of stock not in his possession. Ground 4 of the notice of appeal is consequently without substance.

This Court does not see how the delay in making the attachment can effect the respondent. He gives a reasonable explanation to the effect that he could not very well attach any cattle until such time as his ex-wife got married and lobolo was received for her by her guardian.

The appeal is dismissed with costs.

For Appellant: Mr. James, instructed by Mr. E. Franklin, of Weenen.

For Respondent: Mr. Seymour, instructed by Messrs. Nel & Stevens, of Greytown.

Cases referred to:

Zandberg *v.* van Zyl, 1910 A.D. 308.

Cases overruled:

Tabeta and Tabeta v. Mabuza, 1937 N.A.C. (T. & N.) 87.

Mhlonthlo *v.* Xakaxaku, 1940 N.A.C. (C.O.) 52.

Case applied:

Chokoe *v.* Moneri, 1934 N.A.C. (T. & N.) 81.

CASE No. 26 OF 1948.

MKANDIVA DLAMUKA (Appellant) *v.* NDODEMNYAMA KUMALO (Respondent).

(N.A.C. Case No. 25/1/48.)

PIETERMARITZBURG: Wednesday, 13th October, 1948. Before Steenkamp, President; Hobson and Cowan, Members of the Court (North-Eastern Division).

Practice and Procedure—Appeals from Chiefs' Courts to Native Commissioners' Courts—Rules 7 and 9 of Government Notice No. 2255 of 1928—Form of summons—Chief's reasons—Filing of.

Mercantile Law—Loan—Onus of proof in debt of long standing.

Held:

(1) The Chief's reasons for judgment need not be embodied in the summons but must be on record on the day the appeal is heard by the Native Commissioner.

(2) Where the total amount of the claim before the Chief is not less than £5, an appeal lies to the Native Commissioner in terms of the second proviso to Section 12 (4) of Act No. 38 of 1927, as amended, notwithstanding that the claim is made up of separate items, each being less than £5.

(3) A debt against an Estate requires clear proof from the creditor.

Appeal from the Court of the Native Commissioner, New Hanover.

Steenkamp, President (delivering the judgment of the Court):—

This is an appeal from a judgment of the Chief's Court.

A summons on form N.A. 138 was issued to bring the parties before the Native Commissioner's Court. This procedure is irregular and this Court is constrained once again to draw the attention of Clerks of Court, Native Commissioners and other officers of the Court, to Rules 7 and 9 of the Chief's Court Rules and especially to the case of Zwane *v.* Sitole, 1947 N.A.C. (T. & N.) 30. This Court will not in future tolerate any departure from the form prescribed in General Circular No. 24 of 1938, and as set out in the addendum to the judgment in that case.

In the first appeal, the judgment of the Chief is attached to the record, and here it is desired to point out that this Court realises it is not always possible to set out the reasons for the Chief's judgment at the time the appeal notice is prepared. The filing of the reasons on the day of the hearing of the appeal by the Native Commissioner will meet the requirements of the Rules.

The plaintiff sued the defendant in the Chief's Court for the repayment of £5 which plaintiff alleges was lent by his father to Tshuku, an uncle of the defendant's.

Tshuku left no male issue, but had several daughters. His heir was Situku, a brother, who died a bachelor. Tshuku had a younger brother, Peni, who begot the defendant. Tshuku and Peni were not on friendly terms, and it is therefore not surprising that Tshuku's daughters gave evidence on behalf of the plaintiff. They were honest enough to testify that their father, Tshuku and Peni were not on friendly terms.

The Chief gave judgment in favour of defendant, but the Native Commissioner allowed the appeal and altered the Chief's judgment in favour of plaintiff for £5 and costs.

An appeal has been noted to this Court on the following grounds:—

1. The Native Commissioner has no jurisdiction to hear the appeal since the value of the causes of action were below the amount specified in the Native Administration Act, as amended, as value of causes of action which may be brought on appeal from the Native Chiefs' Courts.
2. The judgment is against the weight of evidence and contrary to the probabilities in that the plaintiff failed to discharge the onus of proving in clear terms the fact of the loan and the fact of its non-repayment.

Counsel for appellant has argued that according to the evidence, the amount of £5 was made up of two distinct loans of £3 and £2 respectively and therefore there are two claims each of under £5. This being the case it is contended that no appeal lies from the Chief's Court. This Court cannot agree that two claims are embodied in the declaration before the Chief. The claim was for £5, and in terms of Section 12 (4) of Act No. 38 of 1927, as amended, the judgment is appealable to the Native Commissioner's Court.

It is not disputed that appellant inherited considerably from his uncle, and therefore he is liable to pay the debts. He will naturally not have any knowledge of debts incurred, in view of the fact that his father and his uncle were not on friendly terms. There is a heavy onus on the respondent to prove the debt, and the Court must apply the most meticulous care in scrutinizing the evidence led in support of the claim, and will at the outset approach the claim with suspicion. (Estate Van der Walt *v.* Crooks, 1941 C.P.D. 244.)

The respondent first asserted his claim during the lifetime of Tshuku's widow, who actually handed over to the respondent a beast in settlement of the debt. There is evidence on record that she knew of the debt, but as she had no *locus standi in judicio*, it was not incumbent on her to pay the debt which was the prerogative of the appellant.

The respondent was ordered to return the beast, which he did, and then instituted the present action.

The Native Commissioner in his reasons states that the respondent gave his evidence in a very straightforward manner, and he was impressed with the demeanour. He was supported by his three witnesses, who gave the Court the impression that they were truthful and that their evidence could be relied upon.

The Native Commissioner comments on the demeanour of the appellant, but this Court does not attach much importance to that, as the onus was entirely on the respondent to prove a debt of which the appellant had no knowledge.

The Native Commissioner had the witnesses before him and this Court is not in a position to state that he has erred in his conclusions.

The appeal is dismissed with costs.

For Appellant: Mr. Niehaus, instructed by Messrs. Raulstone & Co., Pietermaritzburg.

For Respondent: Mr. Howard, of Messrs. Stewart, Smith & Howard, New Hanover.

Cases referred to:

Estate Van der Walt *v.* Crooks, 1941 C.P.D. 244.

Statutes, Ordinances, etc., referred to:

Native Administration Act, No. 38 of 1927, Section 12 (4).

Government Notice No. 2255 of 1928, Sections 7 and 9.

Case applied:

Zwane *v.* Sitole, 1947 N.A.C. (T. & N.) 30.

CASE No. 27 OF 1948.

NASON NDIMA (Appellant) *v.* LEONARD SHANGE (Respondent).

(N.A.C. Case No. 27/5/48.)

ESHOWE: Tuesday, 26th October, 1948. Before Steenkamp, President; Tweedie and Leibbrandt, Members of the Court (North-Eastern Division).

Practice and Procedure—Damages—Seduction—Man related to girl in prohibited degree of marriage.

Held: Although the man is related to the girl within the prohibited degree of marriage, he is nevertheless liable for damages for seduction.

Appeal from the Court of the Native Commissioner, Nkandhla.

Steenkamp, President (delivering the judgment of the Court):—

Plaintiff sued the defendant in the Chief's Court for damages for seduction of plaintiff's daughter, Seddie.

The Chief gave judgment in favour of plaintiff, whereupon defendant appealed to the Native Commissioner.

Before the Native Commissioner a legal point was taken to the effect that defendant is a cousin of Seddie's mother, and it was submitted that as the defendant may not marry Seddie, he is not liable to pay damages for seduction. This contention was upheld by the Native Commissioner, and an appeal has now been noted to this Court.

The Native Commissioner, in his reasons, has quoted the case of Mhlongo *v.* Msibi, 1930 N.A.C. (T. & N.) 80, in support of his finding that the relationship operated as a bar to a marriage and consequently a bar to a claim for damages for seduction. That case was not one for damages for seduction, but one for payment of lobolo, and the Appeal Court held that as the man and woman could not legally be married according to Native Law and Custom, a claim for lobolo could not be entertained. From the reading of that report the Appeal Court made it clear that they were not dealing with a case of damages for seduction.

The Native Commissioner, in the present appeal, has misread or misconstrued the principles involved in that case, and to carry his contention to its logical conclusion, would mean that a man may seduce girls within the prohibited degree of marriage, and not be responsible to pay damages.

In other words, he is free to seduce such girls at will and no action may be taken against him—surely a fallacious contention!

The appeal is allowed with costs, and the Native Commissioner's judgment is altered to read:—

" Plea in bar is dismissed with costs."

The record is returned to the Native Commissioner to hear and decide the case on its merits.

For Appellant: Mr. H. H. Kent, Eshowe.

For Respondent: Mr. Brien, of Messrs. Wynne & Wynne, Eshowe.

Cases distinguished:

Mhlongo *v.* Msibi, 1930 N.A.C. (T. & N.) 80.

CASE No. 28 OF 1948.

MAGWANYANA MKIZE (Applicant/Appellant) *v.* **BHOZA MTIYANE (Respondent).**

(N.A.C. Case No. 21/1/48.)

DURBAN: Monday, 1st November, 1948. Before Steenkamp, President; Watson and Craig, Members of the Court (North-Eastern Division).

Practice and Procedure—Damages—Liability jointly and severally.

Held: Where two joint tort feasors are sued in separate actions, it is necessary to allege and to prove that the judgment against the other tort feasor remains unsatisfied.

Appeal from the Court of the Native Commissioner, Mapumulo.

Watson, Member of Court (delivering the judgment of the Court):—

Application for re-instatement: The Court being satisfied with the explanation contained in the affidavit of Mr. Attorney Bestall, grants the application.

The respondent sued the appellant for the sum of £80 as damages for an alleged assault upon him, perpetrated by the appellant and one Muntukaziwa.

The Court below gave judgment in favour of the respondent, joint and several with Muntukaziwa Mbatu, against whom a similar judgment had been granted.

There are several grounds upon which an appeal has been brought, but argument was confined to the fourth ground, which reads as follows:—

> "That the record of evidence does not disclose whether the appellant's judgment against Muntugaziwa is unsatisfied."

Joint wrongdoers are jointly and severally liable *in solidum,* the person injured being entitled to sue any one of them separately for the whole damage, or all of them jointly in the same action, and payment by the one releases the other or others.

It was necessary to allege and to prove, that the judgment against Muntukaziwa remained unsatisfied, and this has not been done in the present case. (Natal Trading and Milling Co., Ltd., *v.* Inglis, 1925 T.P.D. 741-2.) For this reason the appeal must succeed, with costs.

The judgment of the Native Commissioner is altered to a judgment of absolution from the instance, with costs.

Applicant/Appellant: In default.

Respondent: Present in person.

Cases referred to:

Natal Trading and Milling Co., Ltd., *v.* Inglis, 1925 T.P.D. 741.

CASE No. 29 OF 1948.

GELELE MVELASE (Appellant) *v.* DHLANI DHLAMINI (Respondent).

(N.A.C. Case No. 5/1/48.)

DURBAN: Tuesday, 2nd November, 1948. Before Steenkamp, President; Watson and Craig, Members of the Court (North-Eastern Division).

Practice and Procedure—Defamation—Malice—Privileged occasion.

Held: A report to the police accusing plaintiff of theft is privileged, provided defendant had reasonable grounds of suspicion against the plaintiff.

Appeal from the Court of the Native Commissioner, Durban.

Steenkamp, President (delivering the judgment of the Court):—

The plaintiff sues the defendant for damages for defamation of character. The facts are briefly that plaintiff and defendant shared, with two other Natives a cabin in a boat. The defendant drew £18 which he states he placed under his mattress on the bunk in the cabin. When he went to work, he forgot to take his purse with the £18. Later he found that his purse was gone, and the matter was then reported to the police, although there is no conclusive evidence that such a report had been made. Defendant could only give hearsay evidence on this aspect of the case, and he called no witnesses. It is also alleged by plaintiff that defendant informed at least six other persons, accusing him of the theft, but plaintiff did not call any of these people as witnesses, and therefore this allegation falls away.

The plaintiff was searched, but no money was found on him. Plaintiff in his evidence states he had admitted that he moved the mattress on defendant's bunk to a higher bunk where he slept. It is only natural for defendant to suspect the person who interfered with the mattress, of having stolen his money. Assuming the plaintiff's version is the truth, it must be taken into consideration that when a person has just lost such a large amount as £18, he cannot be expected, in the heat of passion, to choose his words, in making a report. He is naturally excited and indignant, because he has lost money, and the question for this Court to decide is whether or not the defendant acted *animus injuriandi* when he pointed to plaintiff as being the person who stole his money.

The Native Commissioner gave judgment in favour of plaintiff for £3 with costs, and against this judgment an appeal has been noted to this Court.

Animus injuriandi may be established not only by proving actual ill-will towards the plaintiff, but by showing the defendant is actuated by any indirect or improper motive, or that he stated what he did not know to be true, recklessly, as to whether it was true or false (Monckten *v.* British South Africa Company, 1920 A.D. at page 332).

Can it be said that the defendant made a statement to the police recklessly, not caring whether it was true or false? Nathan, in his work "The Law of Defamation", mentions that a communication by a person whose money has been stolen there being reasonable grounds for belief that the plaintiff is the thief, made to a friend in order that the latter may endeavour to find out whether the plaintiff is the thief, the motive of the communication being solely to recover the stolen property and discover the thief, is privileged.

We do not think that a person can be called reckless in accusing another, against whom he has a reasonable suspicion of having stolen his money. The Defendant knew that he had left the money under his mattress, and he knew that the plaintiff had removed that mattress, and therefore his first reaction would be to accuse the plaintiff.

As remarked by Nathan in his "Law of Defamation in South Africa", page 89, the mere use of exaggerated language does not necessarily lead to the inference that there is an improper motive.

Malice plays such an important part in defamation cases, that a Court must be satisfied that when defendant uttered the offending words, it was his intention to injure the plaintiff in his good name and reputation, without any justification therefor.

In the present case, defendant has undergone rather a severe loss in the disappearance of his money. If he had lost no money, and yet accused the plaintiff of theft, then it might be said that he acted with malice.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read: "For defendant with costs."

For Appellant: Mr. A. D. G. Clark, of Messrs. Clark & Robbins, Durban.

For Respondent: Mr. F. J. de Jager, of Durban.

Case referred to:

Monckten *v.* British S.A. Co., 1920 A.D. 332.

CASE No. 30 OF 1948.

MZITSHWA NGCOBO (Appellant) *v.* MPIYONKE NGCOBO (Respondent).

(N.A.C. Case No. 12/3/48.)

DURBAN: Wednesday, 3rd November, 1948. Before Steenkamp, President; Watson and Craig, Members of the Court (North-Eastern Division).

Practice and Procedure—Defamation—Damages—Breach of etiquette or lack of good manners.

Held: A breach of etiquette or lack of good manners does not give rise to a case of action for damages.

Appeal from the Court of the Native Commissioner, Ndwedwe.

Steenkamp, President (delivering the judgment of the Court):—

The plaintiff sued the defendant (respondent) for one beast, being damages he sustained in his good name by respondent ridiculing him by opening or taking away the "imbenge" which covered plaintiff's beer.

The Chief gave judgment for defendant, and on appeal to the Native Commissioner this judgment was sustained. An appeal has now been noted to this Court.

In his evidence, the appellant states that he was invited to a beer drink at the kraal of one Mlandu. When he arrived he was served with a pot of beer which had been strained in his presence, after which Mlandu covered the beer with an "imbenge". The appellant drank some of the beer after it had been covered. The cover ("imbenge") was evidently replaced and the respondent thereafter took it off the beer pot and threw it to the other side of the hut. When he did this, he mentioned that the appellant could not claim respect at that particular kraal, as he was not the kraal head.

It has been ascertained that an "imbenge" is a kind of covering made of grass and used exclusively to cover the pot of beer set aside for a person of prominence. We are not prepared to say that an ordinary kraal head falls under this category, as opinion is divided.

We have consulted "The Social System of the Zulus" by E. J. Krige, but nowhere can it be found that the removal of a cover is a breach of etiquette. Krige defines an "imbenge" as "a small basket about the size of a large bowl, made of grass and palm leaves, and used for serving food". An "ingcelu" is also defined as a broad shallow shaped "imbenge", and evidently an article of that shape may be used either as a plate for serving food or as a covering for a larger utensil.

The appellant is evidently under the impression that a breach of etiquette, or lack of good manners, gives rise to an action for damages, but this Court is not prepared to hold that such is the case. Moreover there is no provision in the Code for this type of damages, and we will go so far as to state that even if such a cause for damages was ever one under ancient Native Law and Custom, it is opposed to the principles of natural justice, whatever might be the position of a Chief who is treated in such a disrespectful manner. He will probably be entitled to fine the culprit.

Furthermore, a kraal head is entitled to order a person who misbehaves himself to leave the kraal, and if such a person remains in or about any kraal after being requested to withdraw, shall be guilty of an offence (Section 160 of the Code).

The Native Commissioner, at the close of appellant's case, did not call upon the respondent to lead evidence, as, in his opinion, the action of the respondent does not give rise to a cause of action. This Court is in entire agreement with the Native Commissioner, and the appeal is accordingly dismissed with costs.

Appellant: Present in person.

Respondent: Present in person.

Statutes, Ordinances, etc., referred to:

Natal Native Law Code, Section 160.

NATIVE DIVORCE COURT.

CASE No. 31 OF 1948.

LUCAS MOLETE (Applicant) *v.* **CONSTANCE MOLETE (Respondent).**

(N.D.C. Case No. 48/58/1947.)

PRETORIA: Friday, 19th November, 1948. Before Steenkamp, President, Native Divorce Court, North-Eastern Division.

Practice and Procedure—Native Divorce Court—Judgments (default)—Rescission of.

Held: That notwithstanding the absence of rules to that effect, the Native Divorce Court has the inherent power to rescind its judgment which was obtained by default or fraud.

Steenkamp, President (delivering the judgment of the Court): —

This is an application for the rescission of a default judgment granted against the applicant, in an action for divorce on the grounds of adultery.

According to the Messenger of Court's mode of service endorsed on the original summons, personal service of a copy of the summons was effected on the defendant (applicant) at a house in Doornfontein, but the applicant has filed an affidavit supported by a medical certificate, to the effect that on the day the summons is alleged to have been served, he was a patient in the General Hospital at Johannesburg.

The Messenger of the Court was called as a witness when this application was heard, and although he testified on oath that in this case he served the summons personally on the defendant he admitted that on other occasions his endorsements had been false. Counsel for respondent thereupon consented to a rescission of the default judgment.

This Court was doubtful whether it has the power to rescind a default judgment as the Native Divorce Court Rules make no provision therefor, but it seems to me, applying the principles of Common Law, that notwithstanding the absence of rules to that effect, this Court has the inherent power to rescind a judgment obtained by default or fraud.

In the case of Zuma *v.* Ngubane, 1947 N.A.C. (T. & N.) 80, the Native Appeal Court rescinded a judgment previously granted by it in the absence of respondent, whose default was due to a misunderstanding. In that case the legal aspects were fully dealt with when it was decided that the principle of *restitutio in integrum* is applicable to cases of this nature.

In the case of Meintjes *v.* Theunissen, 10 E.D.C. 65, it was held that a Magistrate's Court or a Superior Court has power to annul its own judgment, if it is made to appear that it has been given on a complete misconception of the facts. These principles can be applied to the present case in which Counsel for respondent accepted the fact that the previous default judgment for a divorce was granted on the mistaken fact that the summons had actually been served personally on the applicant.

There is also the case of Ritchie *v.* Andrews, 2. E.D.C. 254, in which it was held that the trial court has jurisdiction to recall its own final order adjudicating the sequestration of an estate where it was shown that such order has been improperly obtained. [See also the case of Braham *v.* Romijn, N.O. 1893 H. 116 (S.A. Republic).]

On the strength of the cases quoted, this Court rescinded the default judgment, whereupon Counsel for respondent withdrew the summons, indicating at the same time that he is issuing a fresh summons on additional facts which have come to his notice.

For Applicant: Present in person.

For Respondent: Mr. T. J. J. Ntwasa.

Cases referred to:

Zuma *v.* Ngubane, 1947 N.A.C. (T. & N.) 80.

Meintjes *v.* Theunissen, 10 E.D.C. 65.

Ritchie *v.* Andrews, 2 E.D.C. 254.

Braham *v.* Romijn, N.O. 1893 H.116 (S.A. Republic).